Pallorium, Inc. v. Jared
Cal.App. 4 Dist.,2007.
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Court of Appeal, Fourth District, Division 3, California.
PALLORIUM, INC., Plaintiff and Appellant,
v.
Stephen J. JARED, Defendant and Respondent.
No. G036124.
(Super.Ct.No. 03CC12794).

Jan. 11, 2007.

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Office of Gary Kurtz and Gary Kurtz for Plaintiff and Appellant.
The Morris Law Firm and Aaron P. Morris for Defendant and Respondent.

OPINION

O'LEARY, J.
***1** Pallorium, Inc., appeals from a judgment entered after a bench trial in which the trial court found Stephen J. Jared, doing business as Osirusoft Research and Engineering (Jared), was immune from liability pursuant to two provisions of the federal Communications Decency Act (the Act), title 47 United States Code section 230 (section 230). Jared developed a filter using open relay data to block unsolicited commercial e-mail from coming to his servers and network system. Jared made his filter and open relay database available at no cost through his Web site. At some point, Pallorium's Internet protocol (IP) address was listed on Jared's database as an open relay, which identified it as an IP address through which people could anonymously send unsolicited commercial e-mail.

Pallorium sued Jared for negligence, negligent and intentional interference with economic advantage and prospective economic advantage, and unfair business practices. Pallorium argues the trial court erroneously allowed Jared to amend his answer to include the immunity defense, denied its right to a jury trial, and found Jared immune. Because we find Jared immune from liability pursuant to one provision of the Act, we need not address his claims regarding the other provision and the denial of his right to a jury trial. We affirm the judgment.

FACTS [FN1]

FN1. The technical facts as to how Jared's system worked were taken from his trial testimony.

Jared was tired of receiving unsolicited commercial e-mail “UCE” or “spam” (spam). He developed a filter to block spam from coming to his server and network system (Block Lists). To do this, Jared gathered open relay data from other spam prevention sites. “An open relay is a mail server that is unsecured. Anyone from anywhere can use it to send an e-mail.” Jared also developed an open relay checker-an automated system that would identify IP addresses of e-mail servers and send an e-mail to that site and if the e-mail came back, it identified the server as an open relay. Based on the third-party open relay data and his open relay checker, Jared created Block Lists that identified open relay servers by IP address that “spammers” could send e-mails through hiding their identities by showing the open relay IP address instead of the spammer's address.[FN2]

FN2. According to Jared, 18 percent of spam comes through open relays. Steven Rambam, Pallorium's president, disagreed saying it was about 10 percent.

Jared's system allowed for anyone who felt an IP address was incorrectly listed on the Block Lists to have it removed. Jared made his Block Lists available at no charge to the general public through his Web site. Jared's Block Lists became very popular and at one point between 12 and 20 percent of all e-mail was compared to the Block Lists' data.

Pallorium is a worldwide investigative agency. Because of Pallorium's worldwide business dealings, communication via e-mail is vital to its operation. Rambam learned Pallorium's IP address was listed on Jared's Block Lists.

In the meantime, Jared's system was the victim of “a distributed denial of service attack,” which overwhelmed his servers and rendered them inaccessible. Jared, who was out-of-state at the time, could not repel the attack. The attack resulted in delays of e-mail service and loss of e-mail. Finally, when Jared returned home, he configured his system to send messages saying to stop using his system-“a form of surrender.”

***2** After learning Pallorium's IP address was listed as an open relay server on Jared's Block Lists, Rambam immediately contacted Jared to report the mistake. During a telephone call, Rambam told Jared that Pallorium's IP address was mistakenly listed on his Block Lists, and Jared replied, “fuck you.” Rambam threatened to sue, and Jared hung up.

On October 21, 2003, Pallorium filed a complaint against Jared alleging causes of action for negligence, negligent and intentional interference with economic advantage and prospective economic advantage, and unfair business practices. Approximately two and one-half months later, Jared, in propria persona, filed a “motion to strike” the complaint, which did not include any affirmative defenses. The trial court denied the motion to strike, but deemed the motion Jared's answer. A trial date was set, but on August 3, 2004, Jared retained counsel, and the trial date was continued. The trial date was continued again because Rambam had to travel out-of-state.

One year after Pallorium filed its complaint, nine months after Jared filed his motion to strike, and two and one-half months after Jared retained counsel, Jared filed a motion for judgment on the pleadings alleging he was immune from liability pursuant to the Act. Pallorium opposed the motion on procedural grounds-improper service and untimely. Jared filed in limine motions alleging the immunity defense, although it is not in the clerk's transcript. Pallorium filed a trial brief and opposed the in limine motions. Pallorium opposed Jared's motion for judgment on the pleadings on substantive grounds. Jared replied.

At a case management conference, the trial court ruled Jared must raise the immunity defense in his answer and permitted him to amend his answer.

Jared filed a motion to amend his answer to include the immunity defense. Pallorium opposed the motion on procedural and substantive grounds. The trial court denied Jared's motions without prejudice based on procedural grounds.

Jared refiled his motions. Pallorium opposed the motions again on substantive and procedural grounds. As to the procedural grounds, Pallorium argued Jared failed to comply with Code of Civil Procedure section 1008,[FN3] and California Rules of Court, rule 327 (former rule 327 now rule 3.1324) (hereinafter, Rule 327), Amended Pleadings And Amendments To Pleadings. Jared replied.

FN3. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The trial court granted Jared's motion to amend his answer, and it was deemed filed. As to Jared's motion for judgment on the pleadings, the court ordered the trial bifurcated to determine whether Jared was immune pursuant to the Act and ordered the parties to brief the issue.

At the hearing, both Jared and Rambam testified. Jared testified he did not manually add Pallorium to his Block Lists. He stated it was added through his open relay checker.

In a tentative opinion, the trial court ruled Jared was immune from liability pursuant to two provisions of the Act-section 230(c)(2)(A) & (B). Pallorium objected to the tentative decision. The court overruled Pallorium's objections. Specifically, the court overruled Pallorium's new argument, raised for the first time in its objections, that Jared's conduct was criminal.

DISCUSSION

I. Motion to Amend Answer

***3** Pallorium argues the trial court abused its discretion in granting Jared's motion to amend his answer to include the immunity defense because Jared did not comply with section 1008 and Rule 327, and granting leave to amend prejudiced its case because the discovery cut-off date had passed and the court did not order further discovery. We disagree.

Amendment of a pleading may be allowed, even after commencement of trial, to correct a mistake. (§§ 473, subd. (a)(1), 576.) Amendments are liberally allowed in furtherance of justice (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939), "the trial court has wide discretion" in the matter (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135), and its ruling "will be upheld unless a manifest or gross abuse of discretion is shown" (*ibid.*). These policies "almost invariably result in affirmance" where leave to amend has been granted. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1126, p. 582.) Moreover, the policy of liberal allowance of amendments applies with particular force to answers (*Gould v. Stafford* (1894) 101 Cal. 32, 34; *Permalab-Metalab Equipment Corp. v. Maryland Cas. Co.* (1972) 25 Cal.App.3d 465, 472), "for a defendant denied leave to amend is permanently deprived of a defense[ ]" (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159 (*Hulsey*)). Factors bearing on granting leave to amend include prejudice to the opposing party and diligence of the moving party. (*Permalab-Metalab Equipment Corp. v. Maryland Cas. Co., supra*, 25 Cal.App.3d at p. 472.)

Here, the trial court initially denied Jared's motion to amend his answer based on what Pallorium concedes were procedural grounds. Although we are unsure of the grounds because they are not included in the trial court's minute order, Pallorium asserts the court denied the motion because Jared included his declaration supporting the amendment with his reply, not the original opening brief as required by Rule 327. The trial court denied the motion "without prejudice," which means Jared could file his motion again. (*Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App .4th 1007, 1015 [section 1008 inapplicable when trial court indicated it wanted to reconsider fee issue when it denied first motion without prejudice].) Therefore, section 1008, which authorizes a party to file a motion for reconsideration based on new facts or new law, was not implicated because Jared was not proceeding on either. The trial court authorized Jared to refile a motion that was procedurally defective.

As to Pallorium's claim Jared did not comply with Rule 327(b)(3) and (4) when he refiled his motion, Jared's counsel submitted a declaration with the motion to amend the answer. Rule 327(b), states: "[Supporting declaration] A separate declaration must accompany the motion and must specify: [¶] (1) The effect of the amendment; [¶] (2) Why the amendment is necessary and proper; [¶] (3) When the facts giving rise to the amended allegations were discovered; and [¶] (4) The reasons why the request for amendment was not made earlier." (Boldface omitted.)

***4** In his declaration, counsel stated, "[t]he amended answer ... will further justice by permitting the parties to present in one action all of the facts necessary for the trier of fact to make a proper determination. If [Jared] is forced to proceed with the current answer, he will be deprived of the opportunity to present a defense that may well dispose of the entire action." Additionally, counsel explained, "[A]t the time [Jared] filed his answer, he was representing himself. [Jared] did not properly allege as an affirmative defense the federal statute that bars the instant action ." Finally, counsel said, "[Jared] erroneously represented to [him], based on his misunderstanding of the process, that an answer was filed in this action, and it was not until shortly before the trial date that I discovered that no answer was ever filed. The fact that the ... Act likely bars this action was not discovered until [he] was preparing motions in limine for trial. Once that authority was discovered, [he] elected to bring the motion as a motion for judgment on the pleadings since a motion in limine is more limited. This court then ruled that the Act needed to be set forth as an affirmative defense, and afforded [Jared] the opportunity to move to amend the answer."

Jared's counsel explained amending the answer to include the immunity defense would further justice by resolving the matter in one action. Counsel stated the amendment was necessary and proper to present a meritorious defense. He also explained that after substituting in, he believed an answer had been filed. Although the more prudent thing to do would have been to examine the court file, counsel discovered an answer had not been filed shortly before trial. He then filed a motion for judgment on the pleadings raising the immunity defense. That was all Rule 327 required.

Finally, Pallorium argues Jared was not diligent in filing the motion to amend the answer and allowing Jared to amend his answer was prejudicial because the discovery cut-off date had passed and the court did not allow further discovery. As to the diligence argument, although we frequently say in propria persona litigants are held to the same standards as attorneys (*Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121), we typically scrutinize submissions by such persons to ensure that potentially meritorious defenses are not lost as the result of inept presentation. Additionally, Jared's counsel said he did not discover the applicability of the Act as a defense until he was preparing in limine motions and decided to bring the motion as a motion for judgment on the pleadings. Jared's counsel substituted in as counsel in August 2004, and he soon filed the motion for judgment on the pleadings, which included the immunity defense, in October 2004 soon after learning the availability of the defense. And, he filed the motion to amend the answer in January 2005.

With respect to its prejudice argument, Pallorium contends allowing Jared to amend his answer to include the immunity defense was prejudicial because the discovery cut-off date had passed, and the court did not authorize additional discovery on some of the key terms addressed in the Act, including "good faith," "interactive computer service," and "technical." True, it does not appear the trial court authorized further discovery, but there is nothing in the record suggesting Pallorium sought a continuance to conduct further discovery. At the bifurcated trial, Rambam testified concerning his understanding of these terms and how Jared did not satisfy any of them. Although we agree with Pallorium that the proceedings here are not ideal examples of trial or appellate procedure,FN4 Pallorium could have elected to seek a continuance to request further discovery.

FN4. We note some of the pleadings filed in the trial court and one of the trial court's minute orders were not included in the clerk's transcript. On our own motion, we have taken judicial notice of the superior court file in this matter. (Evid.Code, §§ 452, subd. (d), 459.) Additionally, Pallorium did not provide any record references in its factual and procedural history. We caution appellate counsel to comply with the California Rules of Court. (Cal. Rules of Court, rule 14(a)(1)(C).)

***5** Pallorium's reliance on *Hulsey, supra,* 218 Cal.App.3d 1150, is misplaced. In *Hulsey,* at trial, the defendant moved to amend to conform to proof more than three years after answering the amended complaint. (*Id.* at p. 1159.) Counsel's excuse for the delay was simply that he discovered the potential defense two days before trial while reading the deposition transcript. (*Ibid.*) In finding the trial court did not abuse its discretion in denying the defendant's motion to amend the answer, the court concluded there was "an unreasonable lack of diligence in the belated assertion of this defense[ ]" and the plaintiff was prejudiced because there was an attorneys fees provision and the plaintiff had the right to know his exposure before trial. (*Ibid.*) As we explain above, Jared's counsel was diligent in filing the motion to amend the answer and Pallorium was not prejudiced by the amendment because it could have sought a continuance.

II. Immunity

Pallorium contends the trial court erroneously concluded Jared was immune from liability under two provisions of the Act-section 230(c)(2)(A) & (B). Because we find Jared was immune from liability pursuant to section 230(c)(2)(B), we need not address the substance of the other provision-section 230(c)(2)(A), including the issue of “good faith” and how Jared's alleged criminal conduct demonstrated “bad faith.” (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777 [we affirm the trial court's judgment if “ ‘correct on any theory of law applicable to the case, including but not limited to the theory adopted by the trial court’ “].) Additionally, this obviates addressing Pallorium's argument the trial court erroneously denied it a jury trial on the immunity issue although we will do so briefly.[FN5] The parties agree we review de novo the trial court's decision finding Jared was immune from liability pursuant to section 230(c)(2)(B). (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1641 [interpretation and application of a statute to essentially undisputed factual circumstances is an issue of law subject to de novo review].)

FN5. In its opening brief, Pallorium spends the majority of its time arguing the jury should have decided whether Jared acted in “good faith” a requirement of section 230(c)(2)(A), the provision we do not address here. However, Pallorium also suggests the jury should have decided whether Jared was a “provider or user of an interactive computer service[ ]” or whether Jared restricted access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable[ ]” material.

We have reviewed the transcript from the hearing. Pallorium's counsel stated the “good faith” issue should be tried to the jury, but that whether Jared was a “provider or user of an interactive computer service[ ]” should be decided by the court. At the next hearing, the trial court stated it would decide the applicability of the Act before the jury was selected. Pallorium's counsel did not object, but stated the jury should decide the “good faith” issue. The trial court responded resolution of the issue turned on which immunity applied because there was more than one. There was no further discussion of the issue.

It was not until the trial court issued its tentative decision that the issue arose again. In its objections to the trial court's tentative decision, Pallorium argued the trial court denied it a jury trial on the “good faith” issue. It also stated that had the trial court found there was sufficient evidence for a finding Jared was entitled to immunity, the court should have instructed the jury on the “good faith” issue and whether Jared restricted access to the specified material.

Painting it in the light most favorable to Pallorium, it objected to a bench trial on the “good faith” issue and not on any other grounds. Additionally, it agreed the trial court should determine whether Jared was a “provider or user of an interactive computer service[,]” an issue we will address anon. Therefore, Pallorium cannot now complain the court decided the immunity issue based on section 230(c)(2)(B), which does not include the “good faith” element. Finally, the trial court properly decided whether Jared was immune pursuant to section 230(c)(2)(B) because immunity is ordinarily decided by the trial court before trial. (*Hunter v. Bryant* (1991) 502 U.S. 224, 228; *Windsor*

Square Homeowners Assn. v. Citation Homes (1997) 54 Cal.App.4th 547, 557-558.)

Section 230 states in relevant part:

"(b) Policy [¶] It is the policy of the United States-[¶] ... [¶] (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [¶] (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material[.]

"(c) Protection for 'good samaritan' blocking and screening of offensive material [¶] (1) Treatment of publisher or speaker [¶] No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. [¶] (2) Civil liability [¶] No provider or user of an interactive computer service shall be held liable on account of-[¶] (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; *or* [¶] (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)." (Boldface omitted, emphasis added, fn. omitted.) Section 230 immunity is robust and the courts have adopted a relatively expansive definition of " 'interactive computer service.' " (*Carafano v. Metrosplash .com. Inc.* (9th Cir.2003) 339 F.3d 1119, 1123.)

***6** Section 230, subdivision (c)(2), includes two independent basis for immunity, subdivision (c)(2)(A), *or* subdivision (c)(2)(B). Immunity under one is not dependent on applicability of the other.

Pallorium contends Jared is not immune from liability pursuant to section 230(c)(2)(B) because: (1) Jared was not a "provider or user of an 'interactive computer service' "; (2) Jared did not block e-mails based on their content; and (3) Jared did not provide the " 'technical means' " to restrict access to the specified material. We will address each contention in turn.

A. Interactive computer service

Pallorium argues Jared was not a "provider or user of an 'interactive computer service' " because "[he] was merely an Internet user who made data available for others to copy." FN6 We disagree.

FN6. At oral argument, Pallorium's appellate counsel claimed Jared conceded he was not a "provider," but only a "user." Jared's appellate counsel argued no such concession was ever made and directed our attention to his respondent's brief where he argued Jared was a "provider." We have reviewed the record and the briefs and conclude Jared made no such concession.

Section 230(f)(2) states: "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

Section 230(f)(4), provides: "The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following: [¶] (A) filter, screen, allow, or disallow content; [¶] (B) pick, choose, analyze, or digest content; or [¶] (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."

In *Batzel v. Smith* (9th Cir.2003) 333 F.3d 1018, the court addressed the scope of the term "interactive computer service." The court stated, "[T]he definition of 'interactive computer service' on its face covers '*any* ' information services or other systems, as long as the service or system allows 'multiple users' to access 'a computer server.' Further, the statute repeatedly refers to 'the Internet and *other* interactive computer services,' ..., making clear that the statutory immunity extends beyond the Internet itself. [Citations.] Also, the definition of 'interactive computer service' after the broad definitional language, states that the definition '*includ[es]* specifically a service or system that provides access to the Internet,' [citation] ..., thereby confirming that services providing access to the Internet as a whole are only a subset of the services to which the statutory immunity applies." (*Id.* at p. 1030, fn. omitted.) The court explained other courts construing section 230 have recognized the term interactive computer service includes a wide range of cyberspace services, not only Internet service providers, including Web sites. (*Id.* at p. 1030, fns. 15 & 16.)

Here, Jared testified he created a dynamic Internet protocol space list based on the open relay data he obtained and he updated it as he received e-mail. He also wrote software called "RB Check" that allowed him and third parties to test for open relay servers. The software allowed third parties to send an IP address to Jared's server. His filter would automatically attempt to relay an e-mail message through the server which would indicate whether the server was open. If the server was open, the IP address was listed on the Block Lists for others to see. Contrary to Pallorium's claim, this was more than a list of open relay servers available to the general public. It was an information service or system that third parties could interact with to determine whether an IP address was an open relay. Therefore, Jared provided "interactive computer services" because his information service or system "provide[d] or enable[d] computer access by multiple users to a computer server."

***7** Pallorium's relies on *Batzel* to contend only "bulletin board services" qualify as "interactive computer services." Pallorium reads *Batzel* too narrowly. As we explain above, *Batzel* stated courts have interpreted "interactive computer services" to mean many things. However, the court declined to address whether a "listserv" or Web site fit within "the broad statutory definition of "interactive computer service."

B. Content based

Pallorium claims Jared is not immune from liability pursuant to section 230(c)(2)(B) because he did not block e-mail based on their content, but instead based on the configuration of e-mail servers as open relays. We find no merit in this contention.

Section 230(c)(2)(B) immunizes providers or users of an "interactive computer service" who enable or make available to information content providers or others the technical means to restrict access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not [the] material is constitutionally protected[.]"

Here, Jared testified he received spam concerning "[p]enis enlargement[s], Viagra, web hosting," and "pornography." Jared created his filter to prevent this harassing and objectionable spam from reaching his servers. Although Jared's filter might have been over-inclusive because it blocked "legitimate" e-mail, section 230 is concerned only with material the provider or user considers harassing or objectionable. Section 230(c)(2)(B) immunizes a "provider ... of an interactive computer service" who makes available to "others the technical means to restrict access to material" "the *provider or user considers to be* obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." (Italics added, fn. omitted.) Section 230 imposes a subjective element into the determination whether a provider or user is immune from liability. Indeed, one of section 230's goals is "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services[.]" (§ 230(b)(3).) Therefore, whether Jared's filter was over-inclusive is irrelevant so long as he deemed the material to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."

C. Technical means

Pallorium contends Jared is not immune pursuant to section 230(c)(2)(B) because he did not provide the "technical means to restrict access" to the specified material. Again, we disagree.

Section 230(c)(2)(B) immunizes providers or users of an interactive computer service who "enable or make available to information content providers or others the *technical means* to restrict access to [the specified] material." (Italics added, fn. omitted.)

***8** Section 230 does not define "technical means" and no case interpreting section 230 has addressed its scope. However, the Webster's Third New International Dictionary (3d ed) 1981, page 2348, defines "technical" as "having special and usu[ally] practical knowledge esp[ecially] of a mechanical or scientific subject[.]"

Again, contrary to Pallorium's assertion, Jared did more than make a list of open relay servers available to the general public. Jared created a dynamic IP space list based on the open relay data he obtained and maintained it as he received updated information. He also wrote software called "RB Check" that allowed him and third parties to test for open relay servers. The software allowed third parties to send Jared e-mails with IP addresses the third party wanted tested. His system would automatically attempt to relay an e-mail message through the server, which would indicate whether the server was an open relay. We conclude Jared made available the "technical means to restrict access" to the specified material. Therefore, the trial court properly found Jared immune from liability pursuant to section 230(c)(2)(B).

Relying on *People of State of Cal. v. Department of the Navy* (9th Cir.1980) 624 F.2d 885 [emissions standard], *Application of United States of America, Etc.* (3d. Cir1979) 610 F.2d 1148 [tracing of telephone calls], *United Artists Television, Inc. v. Fortnightly Corp.* (2d. Cir.1967) 377 F.2d 872 [amplification or transmission of television signals], and *U.S. v. Snepp* (E.D.Va.1978) 456 F.Supp. 176 [intelligence collection],[FN7] Pallorium argues the distribution of the Block Lists, which is the basis of his lawsuit, is not a "technical means." As we explain above, Jared created software that allowed third parties to check for open relay servers and that information was posted on his Web site. This qualifies as an "action taken to ... make available to information content providers or others the technical means to restrict access" to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material. (§ 230(c)(2)(B).)

FN7. See *Snepp v. United States* (1980) 444 U.S. 507.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

WE CONCUR: BEDSWORTH, Acting P.J., and MOORE, J.
Cal.App. 4 Dist.,2007.
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Not Reported in Cal.Rptr.3d, 2007 WL 80955 (Cal.App. 4 Dist.)

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